No. 87-1455

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

FLORIDA POWER & LIGHT COMPANY,

Petitioner,

—against—

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AND APPENDIX FOR RESPONDENT WESTINGHOUSE ELECTRIC CORPORATION IN OPPOSITION

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Questions Presented

1. Whether Supreme Court review is warranted where the appellate court, following careful review of the lower court's factual findings, based its legal conclusions on those findings except for those which it explicitly determined were supported by no credible evidence or were without support in the record?

2. Whether Supreme Court review is warranted when the dispositive questions, in what the Court of Appeals termed a textbook case of commercial impracticability, turn solely on state contract law and fail to raise any issues of federal law?

Rule 28.1 Listing

Westinghouse Electric Corporation has no parent company. The subsidiaries and affiliates of Westinghouse Electric Corporation are:

Commercial Group
Longines-Wittnauer Watch Co.
Seven-Up Bottling Co., Inc.
TCOM Corp.
Thermo King Corporation
Westinghouse Communities, Inc.
Coral Ridge Properties, Inc.
Coral Ridge Realty Corp.
Florida National Properties
Royal Continental Hotels Corp.
Westinghouse Communities of Naples
Westinghouse Elevator Co.
Energy & Advanced Technology Group
Unimation, Inc.
Westinghouse Transportation Div.
Industries & International Group
Fortin Industries, Inc.
Westinghouse Electric Corp., Control Div.
Westinghouse Electric Supply Co.
Group W Westinghouse Broadcasting Company, Inc.
Group W Radio
KDKA-Radio & KDKA-TV
KFWB Radio
KJQY Radio
KMEO AM & FM
KQZY Radio
KODA Radio
KOSI Radio
KPIX-TV
KYM Radio & TV
WBZ Radio & WBZ-TV

WIND Radio
WINS Radio
MUZAK
Group W Systems
Group W Television
WJZ-TV
WPCQ-TV
Group W Productions
Filmation Studios
TVSC
Group W Satellite Communications
Home Theater Network, Inc.
Group W Television Sales
Television & Syndication Center
Washington News Bureau

EXPLANATORY NOTE ON ANNOTATIONS

Respondent adopts the following annotations in this Brief in Opposition.* These are:

"MDL T.___"—refers to a page in the transcript of the fuel supply portion of this case which was tried as a multidistrict action brought by thirteen utility companies, including Florida Power & Light Company, against Westinghouse Electric Corporation.

"T.___"—refers to a page in the transcript of the separate spent fuel disposal proceedings.

"A.___"—refers to a page in the joint appendix submitted to the United States Court of Appeals for the Fourth Circuit.

"FPL-MDL-___"—refers to exhibits admitted into evidence on behalf of Florida Power & Light Company during the multidistrict fuel supply portion of this case.

"FPL-SF-___"—refers to exhibits admitted into evidence on behalf of Florida Power & Light Company during the spent fuel disposal portion of this case.

"DX-SF-___"—refers to exhibits admitted into evidence on behalf of Westinghouse Electric Corporation during the spent fuel disposal portion of this case.

"D."—refers to a page in the deposition of a person whose name precedes the "D."

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* For the convenience of the Court, these annotations are the same as those used by the petitioner in its Petition for a Writ of Certiorari, with the exception of "—aa," which refers to the separate appendix accompanying this Brief.

"D(1)."—refers to the first of two deposition transcripts when the witness was deposed more than once.

"D(2)."—refers to the second of two deposition transcripts when the witness was deposed more than once.

"__a"—refers to a page in the separate appendix accompanying the Petition for a Writ of Certiorari.

"__aa"—refers to a page in the separate appendix accompanying this Brief in Opposition.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Florida Power & Light Co. ("FP&L") has asked this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on August 12, 1987. Because the decision of the Fourth Circuit is correct and does not raise any questions that are worthy of review by this Court, respondent Westinghouse Electric Corp. ("Westinghouse") urges the Court to deny the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Overview

This is a diversity case in which the Court of Appeals, after conducting a full and careful review of the record, concluded that the undisputed facts "make out a textbook illustration of the circumstances warranting the application of the doctrine of impracticability/impossibility of performance as a valid excuse for breach of a contract." (52a). Petitioner is now seeking to have this Court review this judgment despite the fact that it involves no issue of Federal law and despite the fact that, contrary to the picture FP&L paints in its petition, the Court of Appeals carefully analyzed the District Court's findings and, to the extent it did not adopt them, clearly stated its basis for determining that they were without any credible support in the Record.

The contract at issue in this case was signed in 1966 and provided for the supply by Westinghouse of fuel for FP&L's Turkey Point nuclear power plants. (81a). These

plants, which were equipped by Westinghouse, have been in operation since 1972 and will save the ratepayers of Florida in excess of $6 billion dollars over the expected life of the plants. (78a). One clause in one of the pricing options in this fuel contract provided that Westinghouse, beginning in 1975, would "remove" nuclear fuel which had been used but remained radioactive—known in the industry as "spent fuel"—from the Turkey Point plant site. (82a). While FP&L ultimately selected this pricing option, at all times since 1975 there has been no place to which Westinghouse lawfully could remove spent fuel. (130a).

The state of the nuclear industry in 1966 and through the continuing period when Westinghouse has been unable to remove this spent fuel was reviewed by both the District Court and the Fourth Circuit and, even while disagreeing on certain ultimate conclusions, both courts largely agreed on the critical facts as described below.

When the contract was signed, it was the Government's firm policy,[1] and the well-founded belief of everyone in the industry, that "removal" of spent fuel would involve no more than its transportation to another facility for "reprocessing," a chemical process which yields uranium and plutonium that can be sold and used to generate more electricity.[2] No one believed this would impose any substantial burden or cost on Westinghouse. To the contrary, everyone believed that spent fuel had positive salvage value.[3]

1. DX-SF-439, A. 825; DX-SF-440 at 302, 335.

2. DX-SF-434 at 3-4, A. 762-63; T. 815, A. 511; T. 167, A. 391; T. 760-61; T. 454-55, A. 412-13.

3. *See* DX-SF-185 at 6, A. 748; DX-SF-228, A. 759; DX-SF-434 at 4, A. 763; T. 592, A. 462; T. 454-56, 468-70, 473-74, 551, A. 412-20, 442; T. 671, A. 474; T. 802-08, A. 504-09; T. 503-04, A. 431-32.

The Government's position and role during this period were accurately summarized in the following finding by the District Court:

> Regardless of how one views the business judgment of Westinghouse in this regard, the fact is that, as early as 1957 the United States Atomic Energy Commission adopted a policy of assuring the nuclear power industry that the government would, in the event that commercial reprocessing services were not available at reasonable times and conditions when irradiated power reactor fuels were discharged from their reactors, make financial settlement for the materials contained in those fuel elements, and reprocess them. Indeed, in 1965 the Government was actively urging reprocessing of spent fuel, was accepting fuel for reprocessing, and to a limited extent was underwriting a portion of the financial burden associated therewith (92a-93a).

The Government during the 1950's and 1960's never gave any indication that it would use its regulatory power in any way other than to further its firm policy that spent fuel should be reprocessed. Thus, in determining to develop commercial nuclear power plants, the industry reasonably relied on the Government's promise that reprocessing would be made available, and on plans for a commercial reprocessing industry. In fact, the first such commercial facility (the NFS facility in West Valley, New York) commenced operations shortly before the contract in this case was signed.[4] Several witnesses, including an employee of FP&L, also testified expressly that in 1966 no one in the industry or in government had ever seriously considered dealing with spent fuel by permanently burying it.[5]

4. A. 836.

5. T. 815, A. 511; T. 1013-14, A. 575-76; T. 761, 793. An internal FP&L document also specifically recognized that the view of the industry at this time was that waste disposal was "not considered a major cost item." DX-SF-185, A. 745.

Moreover, contrary to its legal position in this case, FP&L itself asserted these very facts about the history of reprocessing in a 1977 application it made to the Florida Public Service Commission when it successfully urged that Commission to pass on to FP&L's ratepayers what it argued were the unforeseeable costs of disposing of spent fuel not covered by this contract.[6]

Due to a series of Government delays and policy reversals, however, at no time from 1975 to and including the present has there been any lawful way to remove spent fuel from Turkey Point. (13a). The private commercial reprocessing plant operating at the time of the execution of the contract closed after some six years of successful operation (first temporarily to allow for expansion and then permanently) (93a); despite the partial construction of other plants being planned in 1966, no other plants were licensed (93a-94a); the Government—despite its earlier promises—was no longer reprocessing spent fuel for the private sector (94a); and there was no storage facility to which the spent fuel could be removed. (130a). Moreover, removal will continue to be legally impossible for all nuclear plants until at least the turn of the next century. (27a-28a, 52a).[7]

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6. DX-SF-434, A. 760; DX-SF435, A. 769.

7. Since nuclear plants—including FP&L's—were constructed on the assumption that spent fuel plants would only have to accumulate discharged fuel for 6-12 months until transfer to a reprocessing plant (159a), reracking the on-site spent fuel pools to expand their storage capacity is the way virtually all utilities (with the encouragement of the Government)—including FP&L,—have dealt with the problems created by the unexpected absence of reprocessing or of any place to which spent fuel could be removed. T. 982-83, A. 551-52; DX-SF-448 at 3-5 and 3-6.

After the year 2000, a form of spent fuel disposition wholly different from any contemplated in 1966[8] may be come available pursuant to the Nuclear Waste Policy Act of 1982 ("NWPA"). This statute—enacted seven years after removal was called for under the contract and three years after the trial of this case—mandates the transfer of spent fuel to an as yet non-existent government facility for permanent storage. The Federal Government is collecting the unforeseen extra cost of building such a facility from utilities, who universally have been permitted to pass the charge on to ratepayers. (27a-28a). The government-imposed cost of disposing of the Turkey Point spent fuel in this manner will be approximately $82 million. It is this extra cost which the Fourth Circuit found unforeseeable and from which Westinghouse was excused. Other costs, involving reracking the Turkey Point spent fuel pools so that the spent fuel could remain on site and the plants could keep operating, have been paid by Westinghouse. This has saved Florida ratepayers $41.3 million.[9]

The District Court Decisions

In reviewing the District Court judgment the Fourth Circuit had to deal with the fact that the District Court had issued three separate decisions in this case, each materially inconsistent with the others.

Opinion One

FP&L brought this lawsuit seeking an order of specific performance requiring Westinghouse to remove the spent fuel from the Turkey Point site. (82a). The case was tried before the District Court in 1979, and on June 25,

8. *See* T. 815, A. 511; T. 1013-14, A. 575-76; T. 761, 793.

9. A. 202-05.

1981 the Court issued the first of its three decisions. The Court held that Westinghouse had breached the contract by failing to remove spent fuel in 1975 and rejected Westinghouse's defense of commercial impracticability. The fundamental premise of the decision was that Westinghouse was obligated to remove the spent fuel even though it could not reprocess the fuel, as both parties had anticipated when they contracted. (97a-109a). Because the District Court was uncertain as to what kind of order it realistically could issue, however, it ordered that additional information be developed concerning the feasibility of removal. (115a-119a).

Opinion Two

In October 1983, an evidentiary hearing was held to determine the appropriate remedy in this case. By that time, FP&L had conceded that the spent fuel could not be removed prior to the turn of the next century, and rather than specific performance, FP&L now sought the costs of disposal in the year 2000 under the NWPA. At the hearing, Westinghouse relied on voluminous evidence, including FP&L internal documents, to demonstrate that neither the method of disposal created under the NWPA nor its enormous cost had been foreseeable in 1966, and that the NWPA costs were therefore not recoverable as damages. FP&L did not contest any of this evidence, nor did it present any new evidence on the foreseeability issue.

On January 15, 1984, the District Court issued a decision on remedies[10] which held that as a matter of law

10. Because FP&L has not included this decision in its appendix, Westinghouse has submitted a supplementary appendix containing this decision.

FP&L should bear all of the costs of permanent disposal of the spent fuel, including fees under the NWPA of approximately $82 million since these fees could not have been foreseen in 1966.[11] The Court reached this decision under the law of damages as well the doctrine of equitable adjustment. In doing so, the District Court found that, (1) due to circumstances "that neither party anticipated nor could reasonably be expected to have anticipated," there was no lawful way for Westinghouse to remove spent fuel (5aa); (2) the method of removal mandated by the NWPA was "vitally different" from what the parties had anticipated when the Contract was executed in 1966 (6aa); and (3) in 1966, it had not been foreseeable that removal of the spent fuel might cost in excess of $70 million (7aa). In essence, this opinion of the District Court reaches the same conclusions as the later Fourth Circuit opinion. The Court also pointed to the equities favoring this result, relying among other things on the undisputed savings to the FP&L ratepayers of at least $6 billion from the operation of the plants. (7aa).

Opinion Three

In February 1984, FP&L filed a motion for reconsideration based primarily on a claim that it had been "unfairly surprised" by the issues addressed at the remedy hearing. On November 8, 1984, the District Court granted FP&L's motion for reconsideration and issued a new opinion concerning both Westinghouse's defenses and the appropriate remedy in the case. Although the Court summarily re-

11. The Court also ruled that Westinghouse should bear the reracking costs for FP&L's storage facilities.

jected FP&L's "unfair surprise" argument (121a), it proceeded to address exactly the same issues resolved in its January 1984 decision and completely reversed it. Thus, the Court simply changed its mind with respect to virtually every issue in the case and concluded that Westinghouse should bear all of the final disposal costs under the NWPA, as well as certain interim storage costs totalling over $12 million. (149a-160a).

The Fourth Circuit Decision

On August 12, 1987, the Fourth Circuit issued a comprehensive 103-page opinion fully resolving the issues developed over more than a decade of litigation between the parties. As described below, the opinion includes extensive discussion of the District Court's findings and, to the extent they were being rejected, makes the explicit findings contemplated by Rule 52(a) of the Federal Rules of Civil Procedure.

The Fourth Circuit began its opinion by reviewing the history of the spent fuel issue. (8a-29a). This analysis was totally consistent with the District Court's findings and has not been disputed by FP&L. After completing this analysis the Fourth Circuit held that Westinghouse's impracticability defense had been established by the "undisputed facts" in the record. (52a). Among these facts were: (1) reprocessing was the only means of spent fuel disposal available at the time the contract was signed in 1966 (51a); (2) there has never been any long term storage available as an alternative to reprocessing for FP&L's spent fuel, either at the time of contracting, the time performance became due, or even today (52a); and (3) at the

time performance became due and for 25 years thereafter, no means of disposal existed, including reprocessing or any other alternative. (*Id.*).[12]

The Fourth Circuit also proceeded to analyze the purported basis for statements in the District Court's opinions which arguably could be considered to support the District Court's contrary conclusion. For example,

a. The Fourth Circuit explicitly found any suggestion by the District Court that the parties foresaw or contemplated any form of disposal other than reprocessing to be "manifestly erroneous." (51a). It based this plainly correct conclusion on the uncontested fact that no alternative means of disposal then or ever existed. (51a-52a).

b. The Fourth Circuit analyzed in detail the District Court's suggestion that in 1966 reprocessing was too "uncertain and speculative to have been a basic assumption of the contract" and properly held that any such conclusion "was completely refuted by the record." (53a). In reaching this conclusion that Court relied upon a series of unchallenged facts. (57a-63a). For example, the Fourth Circuit pointed out that:

1. It would defy all logic to find that FP&L would have made the enormous expenditure for construction of the Turkey Point plants if it actually believed that reprocessing, the only known method of disposal, was non-existent or uncertain (57a-58a);

12. These facts were also found by the District Court. (122a, 126a-129a). As the Fourth Circuit noted, the District Court also found "at varying points in its opinions that the parties 'intended,' or 'contemplated,' or 'anticipated,' or 'understood' at the time they executed the contract that reprocessing would be the method for disposing of the spent fuel." (50a).

2. Because the Turkey Point plants had an expected operations life of thirty years and the Westinghouse fuel contract was for only ten years, FP&L knew upon signing the contract that it would be responsible for disposing of at least twenty years worth of spent fuel. There can thus be no doubt that if reprocessing were truly uncertain in 1966, FP&L would never have signed a contract giving it, at a minimum, a twenty-year exposure for spent fuel disposal (58a-59a); and

3. The only evidence cited by the District Court to support its view that reprocssing was uncertain was testimony by an FP&L executive, which was directly contradicted by his own earlier contemporaneous memorandum and his trial admission that reprocessing was the only method known by FP&L for disposing of spent fuel at the time of the contract. (57a).

c. After analyzing all the relevant evidence concerning the parties' understanding at the time the contract was executed, the Fourth Circuit correctly concluded that:

> We are unable to distill from this record the slightest credible evidence that at the time this contract was executed both parties had not assumed (1) that reprocessing was a practical and available method for disposing of spent fuel, (2) that it was the method of disposal by which it was intended that, dependent on Florida's election under the option granted it, the party obligated would dispose of the spent fuel, and (3) that, if commercial reprocessing was not available on reasonable terms, the Government would reprocess the plants' spent fuel. (64a).[13]

13. In place of the clear record in this case, FP&L has attempted to substitute isolated phrases taken out of context from other cases

(footnote continued on next page)

d. The Fourth Circuit also considered the District Court's view that it was *commercial* reprocessing that was uncertain, because no such reprocessing facility was in operation when the contract was signed and because the later regulatory obstacles were already on the horizon in 1970. Again, after carefully reviewing the evidence, the Fourth Circuit found the first basis to be erroneous (the NFS reprocessing plant in fact commenced operations before the contract was signed) and, as to the second, correctly found "no credible evidence to support the finding that the woes of commercial reprocessing which developed in the 1970's were foreshadowed in 1965." (65a-67a);[14]

e. As to the District Court's uncertain finding that the abandoned AGNS reprocessing factility (which was not owned by Westinghouse) could have been used to receive the spent fuel had Westinghouse been more vigilant, the Fourth Circuit both pointed to the statements in the District

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dealing with different issues in order to create the misimpression that reprocessing was speculative. Thus, for example, FP&L cites *NL Industries, Inc.* v. *United States,* 12 Cl. Ct. 391, 400 (1987), *aff'd,* No. 87-1474 (Fed. Cir. Feb. 24, 1988) (to be reported at 839 F.2d 1578) (available on WESTLAW), a decision issued in the context of a motion to dismiss rather than after a full trial, and involving the wholly different issue of when government regulation can constitute a "taking" under the Fifth Amendment. Moreover, FP&L ignores the fact that the *NL Industries* court also noted that defendant could point to no deficiency in plaintiff's allegations that "it neither knew nor could have foreseen" the concerns which led to the 1977 ban on reprocessing. *Id.* at 398.

14. In this connection the Fourth Circuit also pointed out that the existence of commercial reprocessing was irrelevant since the industry was relying on the Government's longstanding promise to reprocess spent fuel if private industry were unable to do so on a reasonable basis. As the Fourth Circuit noted the District Court itself relied on the failure of the Government to keep this promise in that part of its third opinion excusing Westinghouse from part of the reracking costs. (66a-68a).

Court's own opinion which were inconsistent with this conclusion and correctly held that such a conclusion "is without any support in the record or, for that matter, in the findings of the district court itself." (72a); and

f. Finally, in reviewing the District Court's discussion of Westinghouse's supposed lack of diligence, the Fourth Circuit properly concluded that "[a]ny charge that Westinghouse had been unable to secure reprocessing for the Turkey Point spent fuel because of a lack of zealous diligence on the part of Westinghouse is without any support in this record." (73a).

In addition to this careful analysis of the District Court's opinion and of the record, the Fourth Circuit reviewed the relevant legal principles—all of which relate to issues of state contract law—and determined that it was necessary to reverse the judgment reflected in the District Court's third opinion. In doing so it, in effect, approved the District Court's January, 1984 opinion.

REASONS FOR DENYING THE WRIT

I.

THIS CASE PRESENTS NO ISSUES WARRANTING SUPREME COURT REVIEW.

In an obvious attempt to transform a dispute turning solely upon issues of state contract law into a case worthy of Supreme Court consideration, FP&L accuses the Fourth Circuit of substituting its own view of the facts for the District Court's factual findings without applying the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure. A review of the Fourth Circuit's opinion, however, demonstrates that the question presented by FP&L is a fictional one which describes an opinion which simply does not exist. In the actual opinion by the Fourth Circuit, virtually every one of the findings supporting the court's ultimate legal conclusion are contained in the District Court decisions issued in this case. The only exceptions are where, after carefully reviewing the record and the District Court's opinions, the Fourth Circuit properly made an explicit finding that specified District Court findings were supported by no credible evidence. *See,* pp. 9-12, *supra.* Moreover, nowhere in the petition does FP&L present any evidence which it asserts undermines the Fourth Circuit's conclusions on those findings it rejected.

The only other question raised by petitioner involves a state law contract issue. Despite FP&L's contrary argument this issue plainly has been properly applied by the Fourth Circuit.

In sum, this case was both correctly decided by the Court of Appeals and hardly involves the kind of "special and important reasons" required by Supreme Court Rule 17 before a writ of certiorari will issue. However important it may be to the parties, FP&L has advanced no persuasive reasons as to why the Supreme Court should agree to further deal with this routine breach of contract claim involving basic principles of state contract law.

A. The Circuit Court Applied The Correct Standard Of Appellate Review

Vigorously arguing for stringent adherence to "the discipline of Rule 52(a)," FP&L Petition at 20, FP&L accuses the Fourth Circuit of conducting a "*de novo* trial" and thereby encroaching on the District Court's fact-finding domain. *Id.* at 15-20. A review of the Court's opinion, however, totally refutes FP&L's contention.

It is difficult to fathom how FP&L can argue that the Fourth Circuit did not follow the proper criteria for reviewing the District Court judgment. Faced with issues of law and fact, it did precisely what a reviewing court is supposed to do. First, it carefully reviewed the District Court's findings against the entire record, accepted the overwhelming number of findings (many of which were uncontested) and rejected only those, which after careful analysis, were determined to be unsupportable. *See* pp. 9-12, *supra*. While the Fourth Circuit did not make express reference to Rule 52(a), in doing so it plainly applied this Court's oft-repeated definition that a finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a

definite and firm conviction that a mistake has been committed." *See, e.g., Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984); *McAllister* v. *United States*, 348 U.S. 19, 20 (1954); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

Thus, for example, FP&L specifically objects to what it describes as the Fourth Circuit's ignoring of the Rule 52(a) standard in connection with the questions of whether reprocessing as the means of disposal was a basic assumption of the parties and whether reprocessing in 1966 was an established practice. (*See* FP&L Petition at 12, 17). As to the each issue, however, the Fourth Circuit extensively discussed the District Court's often contradictory findings and carefully reviewed the entire record.[15] It then concluded that any contrary findings as to the first issue were "manifestly erroneous" and without "the slightest credible evidence" (51a-52a, 69a), and as to the second issue were "completely refuted by the record." (53a). *See* pp. 9-12, *supra*. The Fourth Circuit was not only correct in reaching these conclusions, but FP&L has never—either to the Fourth Circuit or in the instant petition—pointed to the evidence it relies upon to establish that the District Court's findings were not clearly erroneous.[16]

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15. Contrary to FP&L's statement (FP&L Petition at 17) the court below reviewed in detail the extensive trial record and it is incomprehensible how FP&L can dispute this. *See, e.g.* 50a-53a, 55a-63a, 64a-69a, 69a-73a.

16. While stating that the District Court's findings concerning the state of commercial reprocessing are "well documented in the record" (FP&L Petition at 18), nowhere does FP&L identify any evidence inconsistent with the Fourth Circuit's view of the evidence.

Second, FP&L also ignores the fact that not only did the Fourth Circuit's opinion rely extensively on the District Court's findings of fact except as described above, but that the critical issue—whether Westinghouse was excused from performance under the doctrine of commercial impracticability—necessarily hinged on a legal determination and accordingly was properly reviewed by the appellate court. *See Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n.17 (1984).

Finally, contrary to FP&L's assertions, the mere fact that an appellate court conducts a searching review of the record and overturns some of the district court's findings of fact does not violate the principles enunciated in *Anderson* v. *Bessemer City*, 470 U.S. 564 (1985). As Justice Powell cautioned in *Anderson*, that decision should not be read as implying criticism of appellate courts for engaging in a comprehensive review of the entire record, or as encouraging a conclusory application of Rule 52(a) where a more burdensome review is appropriate. *Id.* at 581 (Powell, J., concurring).[17]

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17. FP&L's reliance on *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709 (1986) and *Dennison Mfg. Co.* v. *Panduit Corp.*, 475 U.S. 809 (1986) is similarly misplaced. In *Icicle*, the Court criticized the appellate court because "nowhere in its opinion did [it] ever mention any of the factual findings of the District Court, much less discuss or analyze them." 475 U.S. at 713. This is plainly inapplicable to the present case where the Fourth Circuit explained and analyzed the District Court's findings in painstaking detail. Similarly, in *Dennison*, the Court reversed because the appellate court did not apply the clearly erroneous standard to any of the district court's findings. 475 U.S. at 811. By contrast, the Fourth Circuit here explicitly indicated those instances in which the lower court's findings were supported by no evidence or were otherwise clearly erroneous. *See, e.g.*, 53a, 57a, 64a, 66a, 72a, 73a.

While FP&L obviously would have preferred a cursory review of the record that failed to reveal the shortcomings in the District Court's analysis, the Fourth Circuit's refusal to adopt such a conclusory application of Rule 52(a) is consistent with Supreme Court precedents. Indeed, in a case which had yielded three fundamentally inconsistent opinions by the District Court, it was particularly appropriate for an appellate court to examine the record in the thorough and comprehensive manner engaged in by the Fourth Circuit. In so doing, the Court applied the proper standard of appellate review to reach the correct legal result in the case and fully complied with this Court's ruling in *Anderson*.[18]

B. The Circuit Court Ruling Concerning Allocation Of Risk Was Correct And Raises No Federal Issue

FP&L's contention that the Fourth Circuit ignored the issue of risk allocation (FP&L Petition at 20-22) is specious, raises no issue of Federal law and is not worthy of review in the Supreme Court. The Court's opinion established in painstaking detail that the parties contracted on the basic assumption that reprocessing would be available as the method for disposing of spent fuel. (49a-69a). Neither party ever dreamed that reprocessing might not exist, that removal would be impossible, or that, rather than having a positive salvage value, spent fuel would represent a huge financial liability. In finding that such risks were not, and indeed could not have been, reasonably foreseen at the time of the contract, the Court correctly

18. FP&L's somewhat personal attack on the Fourth Circuit (FP&L Petition at 14) is nothing more than an attempt to use attack advocacy as a substitute for any factual support for its position.

held that such risks were not allocated by the parties. Nothing presented by FP&L in the instant petition affects this conclusion.

Also, if a provision which simply states a party's obligation in general terms could be taken as an allocation of all unknown extraordinary risks to performance, there would be no impracticability defense; the promisor would always be held to have assumed the risk of impracticability. As the Fourth Circuit correctly held, this is not the law. (66a).[19]

Thus, this argument both is completely without merit, and raises no issue of federal law.

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19. *See also* Uniform Commercial Code § 2-615, Official Comment 8. FP&L's futile attempt to place the Fourth Circuit's opinion outside "the vast body of common law" on commercial impracticability (FP&L Petition at 20) is unavailing. The Court quoted from Corbin, Williston, the Restatement of Contracts, the Uniform Commercial Code, and prior decisions of the United States Supreme Court and the Fourth Circuit in order to carefully and accurately set forth the law of impracticability. In this regard, FP&L's claim that the Fourth Circuit relied exclusively on *Opera Company of Boston, Inc.* v. *Wolf Trap Foundation for the Performing Arts,* 817 F.2d 1094 (4th Cir. 1987) in analyzing the commercial impracticability defense while ignoring the Uniform Commercial Code, treatises and other case law (FP&L Petition at 21) must be dismissed as blatantly inaccurate.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

New York, New York
March 31, 1988

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Acion No. 75-0677-R

FLORIDA POWER & LIGHT COMPANY,
Plaintiff.

v.

WESTINGHOUSE ELECTRIC CORPORATION,
Defendant.

MEMORANDUM

On June 25, 1981, for reasons stated in a memorandum of the same date, the Court declared the defendant Westinghouse Electric Corporation ("Westinghouse") liable for monetary damages to Florida Power & Light Company ("Florida") by reason of Westinghouse's breach of a contract entered into between the parties in May of 1966. The facts, and the Court's conclusions based on those facts, are fully reported in 517 F. Supp. 440 (E.D. Va. 1981); hence, a detailed repetition here is unnecessary.

The issue then before the Court dealt with Westinghouse's obligation to remove, pursuant to the contract,

irradiated i.e. "spent" fuel from Florida's Turkey Point plant site. Florida at that time sought relief by way of specific performance and/or substantial monetary damages.

At the time of the Court's memorandum, while a significant number of uncertainties existed in regard to interim storage and final disposal of spent fuel,[1] it was, according to the evidence before the Court, anticipated that by the present date, the Department of Energy would have established an interim storage place for spent fuel. Indeed, the federal government had announced plans to provide a storage facility sometime in the early eighties. Nevertheless, Congress had not, at that time, taken concrete action, and the ultimate disposition of spent fuel was uncertain. The situation has now stablized by virtue of a series of technological and commercial developments, coupled with the enactment, by Congress, of the Nuclear Waste Policy Act of 1982 ("the Act"). 42 U.S.C.A. § 10101 *et seq.*

In an order accompanying the memorandum, the parties were, in part, directed to coordinate their efforts in ascertaining what, if any, storage facilities were then or might in the future be available to store the spent fuel that the Court found Westinghouse had contracted to remove from Florida's facilities.

The parties vigorously sought a solution to the problem and reported to the Court on a reasonably regular basis as to their efforts.

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1. The evidence before the Court at that time was that by the year 1985 Florida's storage pits would reach their potential capacity for storage, creating the need to shut down its reactors with a consequent cost estimated at approximately $500,000 per day, per unit, for replacement power. *See* 517 F. Supp. at 448. Now, in light of the Act, Florida may, and Westinghouse will, further re-rack the pool at Turkey Point. Such reracking estimated to cost Westinghouse approximately $6 million will be sufficient to store the anticipated additional spent fuel assemblies until the Department of Energy has established a permanent site. It was contemplated that during the contract period a total of 941 spent fuel assemblies would be generated. At the time of the original hearing, Turkey Point reactors were each generating 40 spent fuel assemblies per year.

The Court is satisfied of the diligent and sincere effort made by each of the parties. Regrettably, for reasons that follow, the Court finds, and the parties agree, that there is currently no place to which the spent fuel in issue can lawfully be removed from Florida's Turkey Point site.

The parties are in accord that there simply is no way to deal with the spent fuel now, except to re-rack the Turkey Point spent fuel pools again, which Westinghouse has agreed to do, and to continue to store the fuel therein until a means of final disposition becomes available.

It is anticipated that the spent fuel cannot be removed from the site for another fifteen years, and that it will ultimately be disposed of by the federal government through the Department of Energy. That department now has the exclusive right and obligation to provide for removal from the respective generation sites of all spent fuel and high level radioactive wastes generated in the civilian nuclear power program in the United States and to provide for permanent storage thereof. 42 U.S.C. § 10101 *et seq.*

Florida, pursuant to and as required by the Act, has entered into a contract with the Department of Energy. Under that contract, Florida must pay the Department of Energy an estimated $72.4 million for final disposition of all the spent fuel generated under Florida's contract with Westinghouse. An additional expense to Florida has been and will in the future continue to be incurred by way of property taxes and insurance costs estimated to be approximately $2,866,217.

Defendant's contention that since 1975 it has been impossible to remove spent fuel from Florida's Turkey Point site is simply not in accord with the record in this case. While it is accurate that it cannot now be removed, a portion of it could have been removed prior to Florida having to, as it did, spend over $9 million in reracking. *See* 517 F. Supp. at 448.

The facts are that Westinghouse decided to forego any efforts actively to seek or create a storage site. This de-

cision found some justification in its expectation, in light of government policies in 1966 and before, that commercial spent fuel would be reprocessed, with a substantial economic benefit to it. Reprocessing was Westinghouse's goal.

While both parties contemplated reprocessing, it was only Westinghouse who willingly accepted the risk—indeed the Court considered and rejected the arguments defendant now makes in this regard in its first opinion, on the basis of the evidence then before it.

The Court simply will not retry that issue. If the evi dence at those proceedings were as defendant represents, in its pending motion to reconsider, then the Court, on the basis of evidence to the contrary, did not credit it. Additionally, the Court could not disregard Westinghouse's letter of September 2, 1975 to Florida wherein it assigned as its reason, not the lack of a storage site, but its dependency on a reprocessing facility schedule.

The issue present before the Court is to determine the nature of Westinghouse's further obligation, if any, as a consequence of its breach. Florida had originally sought specific performance and/or monetary relief. Florida now agrees that specific performance is not at this time an available form of relief. For the reasons that follow, the Court is of the view that Florida is not entitled to any further relief than that to which the Court made reference in its prior opinion.

As the Court discussed in its prior opinion, 517 F. Supp. at 450, there is considerable similarity between commercial impracticability under the U.C.C. and the common law doctrine of impossibility of performance, which, in turn, is grounded in the doctrines of mutual mistake and frustration of purpose. *See Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Penn. 1980). Commercial impracticability under the U.C.C. is basically a codification of the common law.

Whether one labels the effect of the circumstances which came into play subsequent to the Court's 1981 conclusions as commercial impracticability or common law impossi-

bility is, in the Court's view, only of academic interest. The bottom line is that this Court cannot order the parties to abide by the precise terms of the contract bargained for. According to the expert evidence, and the parties' stipulation, there is currently no place to which the spent fuel could lawfully be removed. Hence, the Court cannot order the fulfillment of the parties' basic assumption that the spent fuel would, and could, be removed from the Turkey Point sites reasonably soon after removal from the reactors. *See* 517 F. Supp. at 452.

The Court concludes that the portion of the contract that contemplated removal of the spent fuel by Westinghouse has become of no force and effect because of circumstances that neither party anticipated nor could reasonably be expected to have anticipated. Although it is not simply the additional costs, which are substantial,[2] cost is a factor that must be considered. Comment 4 to the Florida U.C.C. section on impracticabiilty, to which the Court previously made reference, 517 F. Supp. at 453, provides that increased cost alone may constitute impracticability where the increase is due to "an unforeseen contingency which alters the essential nature of the performance."

Here we have an unanticipated circumstance, the risk of which should not fairly be thrown upon the promisor, that has made performance of the promise to remove the spent fuel vitally different from what the parties had reasonably expected. *See* 18 S. Williston, *Contracts* § 1963 at 180 (3d Ed. 1978). *See also Texas Co. v. Hogarth Shipping Co.*, 256 U.S. 619, 629 (1921), *cited* in 517 F. Supp. at 451.

While the earlier hearing established that one of the reasons for Westinghouse not being able to remove the

2. As substantial as the costs incurred by Florida are, they are dwarfted by Florida's original evidence to the effect that it would, absent removal of the spent fuel assemblies, be damaged to the extent of $1 million a day during the anticipated life of the reactors at Turkey Point. The Court fortunately deemed it prudent to require further effort on the part of each party before it entered any such judgment.

spent fuel was its failure to act diligently and reasonably in either establishing or contracting for a storage site, the principal reason for its failure was the fact that its own interest could not be served without reprocessing. Additionally, Westinghouse may well have concluded that the costs that would be generated by storage at Turkey Point were less than the cost of removal to an interim site awaiting the anticipated reprocessing. In any event, Westinghouse could have at an earlier stage contracted for the removal of the spent fuel assemblies generated prior to Florida Power's expending more than $9 million on the first re-racking to accommodate those assemblies.

Nevertheless, unlike that earlier peroid in the life of the contract, the passage of the Act rendered performance of the contract "vitally different" from what the parties anticipated at the time of execution of the contract. *See Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 991 (5th Cir. 1976), *cited* in 517 F. Supp. at 455.

As the Court previously found, the parties, at the time of the contract, anticipated that Westinghouse would remove the spent fuel within six months to a year after it was removed from the reactors. 517 F. Supp. at 448.

As a consequence of Westinghouse's breach in not removing the spent fuel then awaiting removal, within a reasonable time, as contemplated, and at a time when its own failure to act was the sole impediment to removal, the Court found that Florida had been damaged, by way of costs incurred in the first re-racking in the amount of $9,473,242.04. These damages followed the breach and were in contemplation of the parties when the contract was entered into. The ultimate damage which plaintiff seeks were never contemplated by the parties, nor could either party have reasonably foreseen that Westinghouse would be precluded, as it has now been, from fulfilling its contractual obligation to remove the spent fuel.

While the Court found that Westinghouse assumed the risk that reprocessing would not come to pass, neither it

nor Florida could have reasonably foreseen that Westinghouse would, as a matter of law, be precluded from fulfilling its obligation to remove the spent fuel from the Turkey Point site within a reasonable time.

Additionally, it was not, at the time the contract was executed reasonably foreseeable that the anticipated removal of the spent fuel would impose a financial burden in excess of $70 million.

While the financial burden of removal and storage is admittedly large, the evidence reflects that as a consequence of Florida's having opted for nuclear power, the Turkey Point unit alone, during the years 1973 through 1980, saved its ratepayers in excess of $1,330,750,000. Indeed, Florida represented to the Florida Public Service Commission that even after consideration of projected costs of repair, in the years 1982 to 1991, its customers will save $5,246,588,000. These facts, though material to an equitable adjustment analysis, are not vital to the Court's conclusion that the damages which have arisen did not arise naturally from Westinghouse's breach, nor were they in contemplation of the parties at the time the contract was made. Additionally, the aforementioned savings, in the Court's view, are indicative as to why the Act contemplated the cost of disposal be borne by the ratepayers. That the Act so contemplated is clearly evidenced in the legislative history. *See, e.g.*, H. R. Rep. No. 97-491, 97th Cong., 2nd Sess. *reprinted in* 1983 *U.S. Code Cong. & Ad. News* 3792, 3796; Congressional Budget Office, "Financing Radioactive Waste Disposal," September 1982.

The evidence reflects that the government, having brought about an abrupt revocation of the reprocessing alternative for reasons of national policy, proceeded to develop the necessary alternative—disposal of spent fuel.

Dr. Barrie McLeod, an expert called by Florida to testify before its Public Service Commission, described the government's policy on disposal of spent fuel as follows:

> In this regard there were three general questions: 1) the best packaging of the waste for storage; 2)

> the best medium in which to build the repository (bedded or domed salt, granitic or basaltic rocks, argillaceous clays/shales, etc.) and 3) the site for the repository. Considerable time, at least into the mid-1990's, is required to select the desired alternatives, to design and license the repository, and to construct it and bring it into operation. Given the general insufficiency of at-reactor storage to accommodate discharges much beyond the mid-1980's, additional away-from-reactor interim storage capacity is required. The basic government policy is to provide federally-operated interim spent fuel storage capacity for those utilities requiring it, until such time as the federally-operated permanent waste repositories are available to accept spent fuel for permanent disposal.

Dr. McLeod went on to testify that:

> the President also emphasized that all costs of storage and permanent disposal will be borne through fees paid by the direct users of the facilities and will ultimately be borne by those who benefit from the activities generating the waste. Furthermore, the President announced that a greater variety of permanent disposal alternatives would be considered, thereby increasing the required annual amount of research and development (R&D) and extending the time period over which this R&D would be performed. Since it is the government's intent that this cost be borne by the facility users, this decision increases the R&D component of the total disposal cost to be paid by the users.

The fact is that the Act contemplates that the costs of final disposition of spent fuel will be passed through to ratepayers, and The Florida Public Service Commission has determined that as a matter of policy it was fair and equitable for ratepayers to pay the final disposition costs.

It cannot be said that the damages that have flowed from the unanticipated and unforeseen circumstances precluding the present removal of the spent fuel are one which arose naturally from Westinghouse's breach of September, 1975.

Specific performance on the part of Westinghouse is, of course, impossible. The law precludes removal except as provided in the Act; Florida has entered into a contract with DOE, as provided in the Act, to have the spent assemblies ultimately removed and disposed of.

The law governing recovery of damages has been well defined since *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854). Recoverable "damages are those that arise naturally from the breach, or those that were in the contemplation of the parties at the time the contract was made." *Life Investors Insurance Company of America v. Johnson*, Fla. App. 422 So.2d 32, 34 (1982); *see also Troxler Electronics Laboratories, Inc. v. Solitron Devices, Inc.*, No. 82-2078 (4th Cir. Dec. 1, 1983). Excepting those that the Court previously addressed, the damages that have arisen in this cause did not arise naturally from Westinghouse's breach, nor were they ever in contemplation of the parties.

It follows therefore that plaintiff is not entitled to any further relief than that addressed in the Court's previous opinion. *See* 517 F. Supp. at 460.

The Court reaches the same conclusion through an equitable adjustment analysis. Having found that performance of the contract to remove is now commercially impracticable and/or impossible, the Court has the authority to order an equitable adjustment of the rights and obligations of the parties. *See, e.g., National Presto Industries v. United States*, 338 F.2d 99, 111-12 (Ct. of Cl. 1964), *cert. den.* 380 U.S. 962 (1965); *Aluminum Co. of America, supra*, 499 F. Supp. at 79. *See generally*, Corbin, *Corbin on Contracts*, Vol. 3, Section 613 at 709-712 (1960 and Supp. 1982) and Vol. 6, Section 1333 at 371-372. One Factor that the Court finds relevant in making such an equitable adjust-

ment is the extreme benefit that has accrued to Florida's ratepayers as a result of Florida's having opted for nuclear power, a benefit that will not be negated by imposing on them the spent fuel disposal costs. The Court is mindful also that both Congress, implicitly, and the Florida Public Service Commission, explicitly, have concluded that the users of nuclear-generated electricity can fairly and equitably be required to bear the unexpectedly high costs of long-term disposal of spent fuel. Finally equity requires consideration of the fact that Westinghouse has already lost, and Florida has gained, substantial sums from performance of the contract at issue.

The Court concludes that equity will be served by requiring Westinghouse to pay the interim storage costs of the first and second re-rackings but leaving the other costs of interim and long-term disposal on Florida. This arrangement provides Florida and its ratepayers a substantial reward for having negotiated for the removal clause in the contract, the evidence reflecting that ratepayers elsewhere are being forced to bear the full interim costs as well as the long-term disposal costs. On the other side, Westinghouse will be required to pay a substantial sum for having agreed to the removal clause. At the same time, the ratepayers will absorb the long-term disposal costs that are necessarily concomitant to the cheap energy source from which they have benefitted and will continue to benefit.

An appropriate order will issue.

/s/ Robert R. Merhige, Jr.

United States District Judge

Date Jan. 10 1984